IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Application of	
Ronald VERMEER	Art Unit: 1616
Application No.: 10/572,719	Examiner: Abigail L. FISHER
Filed: March 21, 2005	Docket No.: 2903925-265000
For: CONCENTRATED SUSPENSIONS	

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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I. Real Party in Interest

BAYER CROPSCIENCE AG is the real party in interest by virtue of an assignment recorded on March 21, 2006; assigned a reel/frame number of 017690/0632.

II. Related Appeals and Interferences

Appellants' legal representative is not aware of any prior or pending appeal, judicial proceeding, or interference, which may be related to, directly affect or be directly affected by, or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

Claims 11, 14 – 15, 17, 22, and 25 – 36 are pending in the current application. Claims 11, 14 – 17, 22, and 25 – 36 stand finally rejected under 35 U.S.C. § 103(a) and are under appeal. Claim 16 stands finally rejected under 35 U.S.C. § 112, second paragraph. Claims 1 – 10 were originally presented and Claims 11 – 20 were presented in a preliminary amendment filed on November 29, 2007. Claims 11 – 20 were canceled in the preliminary amendment filed on November 29, 2007. Claims 19 – 20 were canceled and Claims 21 – 24 were newly presented in the amendment filed on April 23, 2008. Claims 18 and 23 – 24 were canceled in the amendment filed on December 18, 2008. Claims 12 – 13 were canceled in the amendment filed on June 24, 2009. Claim 21 was canceled in the amendment filed on December 16, 2009. Claims 25 – 36 were added in the amendment filed on December 1, 2010. Claim 16 is canceled by way of a supplemental amendment in order to place the instant application in "better form for consideration on appeal." MPEP § 1206.

IV. Status of Amendments

Claims 11, 14 – 15, 17, 22, and 25 – 36 are pending. The amendment to Claim 1 and newly added Claims 25 – 36 submitted in the Response dated December 1, 2010 were entered by the Examiner in the Final Office Action dated February 7, 2011.

V. Summary of Claimed Subject Matter

A. Independent Claim 11: The subject matter of Claim 11 is directed to a suspension concentrate consisting of

(a) between 10 and 40% by weight, based on the suspension concentrate, of at least one active compound that is solid at room temperature selected from the group consisting of prothioconazole, tebuconazole, metaminostrobin, and trifloxystrobin,

(b) between 5 and 20% by weight, based on the suspension concentrate, of at least one penetration enhancer selected from the group consisting of alkanolethoxylates of formula (I)

$$CH_3\text{-}(CH_2)_m\text{-}O\text{-}(\text{-}CH_2\text{-}CH_2\text{-}O\text{-})_n\text{-}H \quad (I)$$

wherein

m represents numbers from 9-13, and

n represents numbers from 8-12,

(c) between 3 and 8% by weight, based on the suspension concentrate, of at least one dispersant mixture selected from the group consisting of

(i) a polymer of methyl 2-methyl-2-propenoate and α-(2-methyl-1-oxo-2-propenyl)-ω-methoxypoly(oxy-1,2-ethanediyl) and tristyrylphenolethoxylate having an average of 50 to 60 oxyethylene units,

(ii) a polymer of methyl 2-methyl-2-propenoate and α-(2-methyl-1-oxo-2-propenyl)-ω-methoxypoly(oxy-1,2-ethanediyl) and a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10,000 and an ethylene oxide proportion of between 40 and 60% by weight, and

(iii) a tristyrylphenolethoxylate having an average of 50 to 60 oxyethylene units and a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10,000 and an ethylene oxide proportion of between 40 and 60% by

weight,

d) between 40 and 65% by weight, based on the suspension concentrate, of water, and

e) between 0 and 15% by weight, based on the suspension concentrate, of one or more additives. Specification and originally filed claims, for example, the Specification at page 3, line 10 - page 4, line 8; page 5, lines 3 – 7; page 6, lines 13 – 25; and Examples 1 – 5.

VI. Grounds of Rejection to be Review on Appeal

Whether Claims 11, 14, 15, 17, 22, and 26 – 34 are properly rejected under 35 U.S.C. §103(a) as being allegedly obvious over U.S. Patent Application Publication No. 2001/0051175 ("Strom"), in view of Pesticide Sci 153-160 (1995) ("Grayson"), and EP 1023832 ("Aven") as evidenced by U.S. Patent Application Publication No. 2002/0040044 ("Schlatter").

Whether Claims 11 and 16 are properly rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson, U.S. Patent No. 6,559,136 ("Mauler-Machnik"), and WO 9727189 ("Heinemann").

Whether Claim 35 is properly rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson and Aven as evidenced by Schlatter and further in view of U.S. Patent Application Publication No. 2003/0035852 ("Pullen").

Whether Claim 36 is properly rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson, Aven, and Schlatter.

VII. Arguments

A. Rejections Under 35 U.S.C. §112

The Examiner rejects Claim 16 as allegedly containing "insufficient antecedent basis" for the term "fluoxastrobin." Final Office Action at page 2. Claim 16 has been canceled by way of the accompanying amendment solely in order to facilitate prosecution and place the instant application in "better form for consideration on appeal." MPEP § 1206. Accordingly, Appellants respectfully submit that the rejection under 35 U.S.C. §112, second paragraph, is rendered moot and withdrawal is respectfully requested.

B. Rejections Under 35 U.S.C. §103

1. Rejection of Claims 11, 14 – 15, 17, 22, and 26 – 34 over Strom, Grayson, and Aven and as evidenced by Schlatter

Claims 11, 14, 15, 17, 22, and 26 – 34 stand rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson and Aven and as evidenced by Schlatter. Appellants respectfully disagree for at least the reasons that follow.

a. Claims 11, 27 – 30, and 32 – 34 are separately patentable

i. The Examiner does not properly consider the recitation of "consisting of" when rejecting the claims

Claim 11 recites the closed language "consisting of." Specifically, Claim 11 is directed to a suspension concentrate "consisting of" components (a) – (e). The cited references include subject matter that is in addition to the recited components (a) – (e) and therefore outside the scope of the claims. For instance, Example 1 (93.3%) and Example 3 (78%) of Strom teach compositions containing larger amounts of water than the "between 40 and 65% by weight" set forth component (c) of Claim 11. Strom also teach "active compounds" and "surface active agents" that are different from those set forth in components (a) and (c)(i) – (v), respectfully, of Claim 11. Grayson and Aven also teach components outside the scope of the claims. For example, Grayson and Aven each teach "active compounds" that are different from those set forth in component (a) of Claim 11.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

ii. The cited references provide no motivation to include prothioconazole, tebuconazole, metaminostrobin, or trifloxystrobin in the claimed suspension concentrate

Strom fails to teach or suggest any of the claimed active compounds, prothioconazole, tebuconazole, metaminostrobin, or trifloxystrobin. Strom teaches compositions comprising stable aqueous dispersions of a pesticide having specific physiochemical characteristics: (a) a water solubility of less than 0.1 percent and (b) a melting point "sufficiently high so as to melt during melting." Strom, for example, at paragraph [0004]. Strom teaches numerous classes of compounds that exhibit the desired water solubility and melting point properties. *Id.* at paragraphs [0012] to [0015]. However, Strom does not teach or suggest any of the claimed and active compounds, let alone teach that any of prothioconazole, tebuconazole, metaminostrobin, or trifloxystrobin would possess the specific physiochemical profile

preferred in Strom.

Grayson does not remedy the deficiencies of Strom, and fails to teach or suggest any of prothioconazole, tebuconazole, metaminostrobin, or trifloxystrobin. Rather, Grayson evaluates the fungicidal activity of compositions comprising a specific active agent, metconazole, together with C12/C14 alcohol ethoxylates. Grayson at abstract and Tables 1 – 2.

Aven teach a laundry list of over 150 pesticides, fungicides, and herbicides. Both tebuconazole and trifloxystrobin are included in the laundry list of potential compounds described by Aven. Aven at paragraph [0017]. Neither tebuconazole nor trifloxystrobin are listed in any of the 29 Examples described by Aven. Outside of including tebuconazole and trifloxystrobin in a list of possible fungicidal compounds, Aven does not provide any motivation to use either one of these compounds any of the compositions described by either Strom or Grayson. As stated above, Strom teach specific classes of compounds exhibiting specific physiochemical characteristics, for example, (a) a water solubility of less than 0.1 percent and (b) a melting point sufficiently high so as to melt during melting.

The Examiner cites to Schlatter as evidence that "SSF-126 is metaminostrobin." Final Office Action at page 10. Schlatter teach aqueous suspension concentrates comprising a pesticide and surfactant. Schlatter at abstract. Both tebuconazole and trifloxystrobin are included in the laundry list of potential fungicide compounds described by Schlatter. Schlatter at paragraph [0017]. However, none of the claimed active compounds are listed in either of the two examples described by Schlatter. Outside of including tebuconazole and trifloxystrobin in a list of possible fungicidal compounds, Schlatter does not provide any motivation to use either one of these compounds in the composition described by any of Strom, Grayson, or Aven. None of the art, alone or in combination, suggest the use of the claimed active, in a suspension concentration as claimed.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

iii. None of the cited references teach or suggest between 5% and 20% by weight of the claimed alkanolethoxylate penetration enhancer of Formula (I) in the claimed suspension concentrate

In rejecting the claims, the Examiner acknowledges that "Strom et al. do not teach the incorporation of an alkanolethoxylate." Final Office Action at page 5. In addressing this

deficiency, the Examiner cites to Grayson and asserts that "one of ordinary skill in the art would have been motivated to add ethoxylate alcohols such as Genapol adjuvents to the formulation of Strom et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al." *Id.* at page 7. Appellants respectfully disagree.

As acknowledged by the Examiner, Strom does not teach or suggest the claimed alkanolethoxylate penetration enhancer of formula (I). Grayson fails to remedy the deficiency of Strom and does not teach or suggest adding an alkanolethoxylate penetration enhancer of formula (I) to the composition of Strom. As stated above, the compositions of Grayson include metconazole together with Genapol C12/C14 alcohol ethoxylates. According to Grayson, various alcohol ethoxylates (Genapol C050, C080, C100, and C200) enhance the activity of metconazole. Grayson at page 158.

Appellants respectfully disagree with the Examiner's assertion that "[t]here is a reasonable expectation that the effect seen with metconazole as taught by Grayson et al. would reasonably apply to other azoles such as tebuconazole." Final Office Action at page 7. As stated above, Grayson is limited to metconazole and does not teach or suggest any of the claimed active compounds. Although each of metconazole, tebuconazole, and prothioconazole has an azole group, these compounds contain different functional groups and physiochemical properties. Given these structural and physiochemical differences, one of ordinary skill would have no motivation to combine the alcohol ethoxylates of Grayson together with any of the claimed compounds, especially considering that neither Grayson nor Strom teach or suggest any of the claimed active compounds.

Even if one of skill in the art would have the motivation to modify Strom by adding an alcohol ethoxylate of Grayson, none of the cited references teach or suggest "between 5 and 20% by weight" of a penetration enhancer. As set forth in Section 2.3 of Grayson, 2.5 g of each adjuvant was dispersed in 250 ml of tap water. Grayson at page 155. Accordingly, the adjuvant solution of Grayson contains approximately 1% by weight of adjuvant. However, the adjuvant solution of Grayson is expected to be less than 1% by weight as it is further diluted by mixing the adjuvant solution with a formulation dispersion. *Id.* None of Strom, Aven, or Schlatter teach or suggest the claimed alkanolethoxylate penetration enhancer of formula (I), let alone "between 5 and 20% by weight" of the claimed penetration enhancer, let alone in a suspension concentrate.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

iv. None of the cited references teach or suggest between 3% and 8% by weight of the claimed dispersant mixture (c) in a suspension concentrate as claimed

As acknowledged by the Examiner, Strom generally discloses surfactants, but fails to teach or suggest any of the claimed dispersant mixtures (i), (ii), or (iii). Additionally, none of the seven examples set forth in Strom teach or suggest any of the specific dispersant mixtures recited in the claims. Instead, Strom teach that the following surfactant combinations are used such: Morwet D425 and Pluronic P105 (Example 1); Atlox 4991 and Atlox 4913 (Example 3); Iconol TD-6 (Example 6); and Soprophor FL and Empicol LX 28 (Example 7). As discussed above, Strom does not teach or suggest the recited active compounds or penetration enhancers. Thus, even were one of skill in the art to select the claimed dispersant mixtures, one of ordinary skill in the art would still have no reason to combine it with any of the claimed active compounds and the claimed penetration enhancer.

Aven teaches Soprophor FL and Pluronic PE 10 500. However, Aven fails to teach or suggest the recited dispersant mixtures and does not suggest Soprophor FL and Pluronic PE 10 500 used together. None of the cited references teach or suggest any of the claimed dispersant mixtures nor does the Office Action set forth a sufficient reason as to why one of skill in the art would have selected any one of dispersant mixtures (i), (ii), or (iii), let alone combined any of these mixtures with an active compound and penetration enhancer as claimed.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

v. The Dr. Peter Baur Declarations dated April 23, 2008 and December 18, 2008 provide for unexpected results

The Dr. Peter Baur Declarations submitted on April 23, 2008 and December 18, 2008 provide further evidence of the patentability of the claims. As set forth in the Dr. Peter Baur Declaration submitted on April 23, 2008, the penetration of the claimed active compound tebuconazole on leaf cuticles from trees (variety Golden Delicious) was evaluated. Dr. Peter Baur Declaration submitted on April 23, 2008 at page 2 – 3. Specifically, Example 1 of the Dr. Peter Baur Declaration submitted on April 23, 2008 indicates that a composition

containing tebuconazole (as Folicur SC570) and Genapol C-100, a claimed alkanolethoxylate of Formula I (formulation "D"), exhibit increased penetration enhancement properties relative to both tebuconazole alone (formulation "A") and a composition containing tebuconazole and Atlox 4894 (formulations "B" and "C"). This provides for unexpected results and further confirms the patentability of the claims over the cited references.

Further evidence of the patentability of the claims is also set forth in the Dr. Peter Baur Declaration submitted on December 18, 2008. For example, Experiment 1 of the Dr. Peter Baur Declaration submitted on December 18, 2008 confirms that Nativo SC300 (containing tebuconazole and trifloxystrobin) and Genapol C-100 (formulation "A") exhibit increased penetration enhancement properties relative to a composition containing Nativo SC300, Soprophor 4D384, and Agrimer ST (formulation "B"). Additionally, as described in Experiment 2 of the Dr. Peter Baur Declarations submitted on December 18, 2008, tebuconazole (as Folicur WG 25) and Genapol C-100 (formulations "A1" and "A2") exhibit increased penetration enhancement properties relative to a composition containing tebuconazole and Soprophor 4D385 (formulations "B," "C," and "D") and tebuconazole alone (formulation "E"). Taken together, these Declarations provide for unexpected results over the cited references, which fail to teach or suggest the claimed compositions.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

b. Claim 14 is separately patentable

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection over Claim 14 and submit that this claim is separately patentable. As stated above, neither Strom nor Grayson teach or suggest a suspension concentrate where the active compound is "tebuconazole." While Aven and Schlatter both mention tebuconazole in a laundry list of potential active compounds, neither reference includes tebuconazole in an example. Outside of including tebuconazole in a list of possible compounds, neither Aven nor Schlatter provide any motivation to use this compound in any of the compositions described by either Strom or Grayson.

For at least the above, Claim 14 is separately patentable over the cited references.

c. Claim 15 is separately patentable

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants

respectfully disagree with the Examiner's rejection over Claim 15 and submit that this claim is separately patentable. As stated above, neither Strom nor Grayson teach or suggest a suspension concentrate where the active compound is either tebuconazole or trifloxystrobin, let alone a combination of tebuconazole and trifloxystrobin. While Aven and Schlatter both mention tebuconazole and trifloxystrobin in a laundry list of potential active compounds, neither reference includes tebuconazole or trifloxystrobin in an example. Outside of including tebuconazole and trifloxystrobin in a list of possible compounds, neither Aven nor Schlatter provide any motivation to use these compounds in any of the compositions described by either Strom or Grayson. Additionally, in rejecting the claims, the Examiner relies on the extension of the teachings of Grayson, which describes metconazole formulations (an "azole" compound). However, Claims 15 is further distinguished from the cited references as trifloxystrobin is not an "azole" compound.

For at least the above, Claim 15 is separately patentable over the cited references.

d. Claim 17 is separately patentable

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection over Claim 17 and submit that this claim is separately patentable. As stated above, neither Strom nor Grayson teach or suggest a suspension concentrate where the active compound is "trifloxystrobin." While Aven and Schlatter both mention trifloxystrobin in a laundry list of potential active compounds, neither reference includes trifloxystrobin in an example. Outside of including trifloxystrobin in a list of possible compounds, neither Aven nor Schlatter provide any motivation to use this compound in any of the compositions described by either Strom or Grayson. Additionally, in rejecting the claims, the Examiner relies on the extension of the teachings of Grayson, which describes metconazole formulations (an "azole" compound). However, Claim 17 is further distinguished from the cited references as trifloxystrobin is not an "azole" compound.

For at least the above, Claim 17 is separately patentable over the cited references.

e. Claim 22 is separately patentable

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection over Claim 22 and submit that this claim is separately patentable. Even were one of skill in the art to incorporate an alcohol ethoxylate of Grayson into the composition of Strom, there would be no reason to select from Grayson

the alcohol ethoxylate of formula (I) where "m represents 11 and n represents 10" as recited in Claim 22. For one, Grayson discloses that Genapol C050 and Genapol C080 were superior to Genapol C100 and Genapol C200. Thus, even if the Examiner suggests that one of ordinary skill in the art would extend the teachings of Grayson and metconazole to other azole compounds, one of skill in the art would not have had a reason to select Genapol C100, which corresponds with formula (I) when m is 11 and n is 10. Rather, one of ordinary skill in the art would have selected one of the disclosed Genopols with a lower ethylene oxide content. Additionally, one of ordinary skill in the art would have had no reason to select the specific integers of claim 22 because there is no suggestion in Grayson or the other references that such a specific alcohol ethoxylate will work with the active compounds and dispersant mixtures of claim 11.

Accordingly, claim 22 would not have been rendered obvious by the applied references.

f. Claim 25 is separately patentable

i. None of Strom, Grayson, Aven, or Schlatter teach or suggest prothioconazole

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection over Claim 25 and submit that this claim is separately patentable. None of Strom, Grayson, Aven, or Schlatter teach or suggest a suspension concentrate as claimed where the active compound is "prothioconazole." Moreover, the Examiner provides no motivation to alter any of the cited references to include "prothioconazole," let alone "prothioconazole" together with components "b" – "e" in a manner that is consistent with the claims.

For at least the above, Claim 25 is separately patentable over the cited references.

g. Claim 26 is separately patentable

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection over Claim 26 and submit that this claim is separately patentable. As stated above, none of Strom, Grayson, or Aven teach or suggest a suspension concentrate where the active compound is "metominostrobin." While Schlatter mentions metominostrobin in a laundry list of potential active compounds, Schlatter does not teach or suggest metominostrobin in a composition as claimed. Outside of including metominostrobin in a list of possible compounds, Schlatter does not provide any motivation

to use this compound in any of the compositions described by ay of Strom, Grayson, or Aven.

For at least the above, Claim 26 is separately patentable over the cited references.

h. Claim 31 is separately patentable

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection over Claim 31 and submit that this claim is separately patentable. As stated above in Section (VII)(B)(1)(a)(i)-(v), none of Strom, Grayson, Aven, or Schlatter teach or suggest a penetration enhancer selected from the claimed group of alkanolethoxylates of formula (I). Moreover, even if one of skill in the art would have the motivation to modify Strom by adding an alcohol ethoxylate of Grayson, none of the cited references teach or suggest "between 10 and 15% by weight" of a penetration enhancer. As set forth in Section 2.3 of Grayson, 2.5 g of each adjuvant was dispersed in 250 ml of tap water. Grayson at page 155. Accordingly, the adjuvant solution of Grayson contains approximately 1% by weight of adjuvant. However, the adjuvant solution of Grayson is expected to be less than 1% by weight as it is further diluted by mixing the adjuvant solution with a formulation dispersion. *Id.* Both of these amounts taught by Grayson is significantly less than the "between 10 and 15% by weight" set forth in Claim 31.

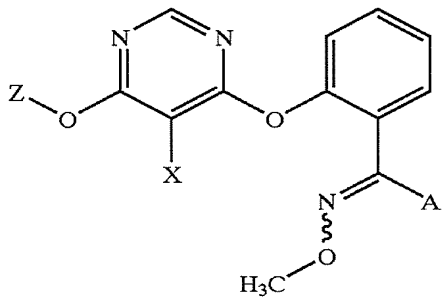
For at least the above, Claim 14 is separately patentable over the cited references.

2. Rejection of Claims 11 and 16 over Strom, Grayson, and Mauler-Machnik and Heinemann

Claims 11 and 16 stand rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson, Mauler-Machnik, and Heinemann. Claim 16 is hereby canceled by way of a Supplemental Response attached herein to place the application in "better form for consideration on appeal." MPEP § 1206. In rejecting the claims, the Examiner acknowledges that "Strom et al. do not specify that the fungicides [sic] fluoxastrobin and prothioconazole can be added." Final Office Action at page 11. The Examiner further cites to Mauler-Machnik and Heinemann and asserts that "[h]owever, this deficiency is cured by Heinemann et al. and Mauler-Machnik et al." *Id.* Appellants respectfully disagree.

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection and submit that the combination of Strom, Grayson, Mauler-Machnik, and Heinemann do not render Claims 11 and 16 obvious under 35

U.S.C. §103(a). Mauler-Machnik teaches combinations of a specific fungicidal pyrimidine compound of Formula (I):



Formula (I)

Mauler-Machnik teaches that compounds of Formula (I) can be combined together with one of 82 different compounds. Mauler-Machnik at columns 1 and 2. As described by the Examiner, Mauler-Machnik teaches tebuconazole (3), epoxiconazole (10), metconazole (11), prothioconazole (69), and trifloxystrobin (75). Final Office Action at page 11 and Mauler-Machnik at columns 1 and 2. Taken together, Mauler-Machnik sets forth thousands of possible pyrimidine/other fungicide combinations. Outside of listing these compound combinations, Mauler-Machnik does not set forth any reason to use any of these compound combinations in the compositions described by Strom and Grayson.

Heinemann does not remedy the deficiencies of Mauler-Machnik and is cited by the Examiner for the recitation fluoxastrobin among hundreds of other compounds. Final Office Action of page 12. As set forth in Heinemann, fluoxastrobin is listed in a laundry list. However, Heinemann does not teach or suggest adding fluoxastrobin, or any other compound, to the composition described by Strom and Grayson. Without more, Appellants respectfully assert that Claims 11 and 16

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

3. Rejection of Claim 35 over Strom, Grayson, Aven, Schlatter, and Pullen

Claim 35 stands rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson and Aven as evidenced by Schlatter and further in view of U.S. Patent Application Publication No. 2003/0035852 ("Pullen"). Appellants respectfully disagree.

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection of Claim 35 over Strom, Grayson, Aven, Schlatter, and Pullen. In rejecting the claims, the Examiner acknowledges that "[n]either Strom et al. or Aven teach utilizing butylated hydroxytoluene as a preservative." Final Office Action at page 15. The Examiner further asserts that "[h]owever, this deficiency is cured by Pullen" and that "[i]t would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven, Grayson et al. and Pullen and utilize." Final Office Action at page 15. Appellants respectfully disagree.

At the outset, Pullen does not teach or suggest any of the claimed components (a) – (d) of Claim 11. Rather, the Examiner cites to Pullen and asserts that this reference provides motivation to add "butylated hydroxytoluene" to the composition as component (e) of Claim 11. Pullen teaches biorational insecticide and fungicides used for controlling insects and fungi. Pullen at abstract. In an aspect, Pullen teaches that the composition may comprise from about 0.05% to about 0.15% by weight of butylated hydroxytoluene. *Id.* at paragraph 0034. However, Pullen does not provide any motivation to add butylated hydroxytoluene to a composition, let alone a composition containing components (a) – (e) as set forth in the claims. Given the teachings of Pullen, there would be no reason to add butylated hydroxytoluene to the claimed composition of Strom et al., Aven, or Grayson.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

4. Rejection of Claim 36 over Strom, Grayson, Aven, and Schlatter

Claim 36 stands rejected under 35 U.S.C. §103(a) as being allegedly obvious over Strom in view of Grayson, Aven and Schlatter.

For at least the reasons set forth above in Sections (VII)(B)(1)(a)(i)-(v), Appellants respectfully disagree with the Examiner's rejection of Claim 36 over Strom in view of Grayson, Aven and Schlatter. In rejecting the claims, the Examiner acknowledges that "[n]either Strom et al. or Aven teach utilizing vegetable oil as a solvent in the suspension concentrates." Final Office Action at page 17. The Examiner further asserts that "[h]owever, this deficiency is cured by Schlatter" and that "[i]t would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven, Grayson et al. and Schlatter and utilize plant oils such as soybean oil." *Id.* Appellants respectfully disagree.

As set forth above, Schlatter does not teach or suggest any of the claimed components (b) – (d) of Claim 11. In rejecting the claims, the Examiner cites to Schlatter and asserts that this reference provides motivation to utilize "vegetable oil as a solvent in the suspension concentrates" of component (e) of Claim 11. Schlatter teaches pesticidal compositions in the form of aqueous suspension concentrates comprising a triazole fungicide. Schlatter at abstract. In an aspect, Schlatter teaches that the composition may comprise a thickening agent, such as ethoxylated vegetable oil. *Id.* at paragraph 0040. However, Schlatter does not provide any motivation to add a vegetable oil to a composition, let alone a composition containing components (a) – (e) as set forth in the claims. Given the teachings of Schlatter, there would be no reason to add vegetable oil to the claimed composition of Strom et al., Aven, or Grayson.

For at least the above, Appellants respectfully request withdrawal of the 35U.S.C. 103(a) rejection.

VIII. Conclusion

Appellants respectfully submit that the Examiner has not set forth a proper *prima facie* case of obviousness because no reasoning has been articulated based on rational underpinnings to support the legal conclusion of obviousness under the *KSR* standard.

Respectfully submitted,

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VIII. Claims Appendix

Listing of Claims:

1-10. (Cancelled)

11. (Previously Presented) A suspension concentrate consisting of

(a) between 10 and 40% by weight, based on the suspension concentrate, of at least one active compound that is solid at room temperature selected from the group consisting of prothioconazole, tebuconazole, metaminostrobin, and trifloxystrobin,

(b) between 5 and 20% by weight, based on the suspension concentrate, of at least one penetration enhancer selected from the group consisting of alkanolethoxylates of formula (I)

$$CH_3\text{-}(CH_2)_m\text{-}O\text{-}(\text{-}CH_2\text{-}CH_2\text{-}O\text{-})_n\text{-}H \quad (I)$$

wherein

m represents numbers from 9-13, and

n represents numbers from 8-12,

(c) between 3 and 8% by weight, based on the suspension concentrate, of at least one dispersant mixture selected from the group consisting of

(i) a polymer of methyl 2-methyl-2-propenoate and α-(2-methyl-1-oxo-2-propenyl)-ω-methoxypoly(oxy-1,2-ethanediyl) and tristyrylphenolethoxylate having an average of 50 to 60 oxyethylene units,

(ii) a polymer of methyl 2-methyl-2-propenoate and α-(2-methyl-1-oxo-2-propenyl)-ω-methoxypoly(oxy-1,2-ethanediyl) and a propylene oxide/ethylene oxide block

copolymer having a molecular weight between 8000 and 10,000 and an ethylene oxide proportion of between 40 and 60% by weight, and

(iii) a tristyrylphenolethoxylate having an average of 50 to 60 oxyethylene units and a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10,000 and an ethylene oxide proportion of between 40 and 60% by weight,

d) between 40 and 65% by weight, based on the suspension concentrate, of water, and

e) between 0 and 15% by weight, based on the suspension concentrate, of one or more additives.

12-13. (Cancelled)

14. (Previously Presented) A suspension concentrate according to Claim 11, wherein component (a) is tebuconazole.

15. (Previously Presented) A suspension concentrate according to Claim 11, wherein component (a) comprises tebuconazole and trifloxystrobin.

16. (Canceled).

17. (Previously Presented) A suspension concentrate according to Claim 11, wherein component (a) is trifloxystrobin.

18-21. (Cancelled)

22. (Previously Presented) A suspension concentrate according to Claim 11 wherein m represents 11 and n represents 10.

23-24. (Cancelled)

25. (Previously Presented) A suspension concentrate according to Claim 11, wherein component (a) is prothioconazole.

26. (Previously Presented) A suspension concentrate according to Claim 11, wherein component (a) is metominostrobin.

27. (Previously Presented) A suspension concentrate according to Claim 11, wherein the at least one dispersant mixture comprises a polymer of methyl 2-methyl-2-propenoate and α-(2-methyl-1-oxo-2-propenyl)-ω-methoxypoly(oxy-1,2-ethanediyl) and tristyrylphenolethoxylate having an average of 50 to 60 oxyethylene units.

28. (Previously Presented) A suspension concentrate according to Claim 11, wherein the at least one dispersant mixture comprises a polymer of methyl 2-methyl-2-propenoate and α-(2-methyl-1-oxo-2-propenyl)-ω-methoxypoly(oxy-1,2-ethanediyl) and a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10,000 and an ethylene oxide proportion of between 40 and 60% by weight.

29. (Previously Presented) A suspension concentrate according to Claim 11, wherein the at least one dispersant mixture comprises a tristyrylphenolethoxylate having an average of 50 to 60 oxyethylene units and a propylene oxide/ethylene oxide block copolymer having a

molecular weight between 8000 and 10,000 and an ethylene oxide proportion of between 40 and 60% by weight.

30. (Previously Presented) A suspension concentrate according to Claim 11, wherein the at least one active compound is present in an amount of between 20 and 30% by weight.

31. (Previously Presented) A suspension concentrate according to Claim 11, wherein the at least one penetration enhancer is present in an amount of between 10 and 15% by weight.

32. (Previously Presented) A suspension concentrate according to Claim 11, wherein the at least one dispersant mixture is present in an amount of between 3 and 5% by weight.

33. (Previously Presented) A suspension concentrate according to Claim 11, further comprising one or more additives e) selected from the group consisting of antifoams, antifreeze agents, preservatives, antioxidants, colorants, vegetable oils, thickeners, and inert fillers.

34. (Previously Presented) A suspension concentrate according to Claim 11, further comprising as e) a preservative; a defoamer selected from the group consisting of silicone oil and magnesium stearate; an antifreeze agent selected from the group consisting of urea, glycerol, and propylene glycol; and a thickener.

35. (Previously Presented) A suspension concentrate according to Claim 11, further comprising as e) butylated hydroxytoluene.

36. (Previously Presented) A suspension concentrate according to Claim 11, further comprising as e) a vegetable oil selected from the group consisting of sunflower oil, rapeseed oil, olive oil, and soybean oil.

IX. Evidence Appendix

NONE

X. Related Proceedings Appendix

NONE